No. 11407

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ANNE JOHNSON, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

and

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ANTHONY SAVAGE, and
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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now, ANNE JOHNSON, appellant in the above entitled cause, and respectfully petitions the court for a rehearing in said cause and in support thereof represents:

1. The court misread and misapprehended certain facts in the record in a material way.
2. The court decided the case according to wrong principles.
3. The court's decision is in conflict with other authorities.

Respectfully submitted,

H. SYLVESTER GARVIN,

ANTHONY SAVAGE,

Counsel for Appellant.

I. ANTHONY SAVAGE, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

ANTHONY SAVAGE,

Counsel for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Introduction

The infrequency with which petitions for rehearing have been granted seems calculated to persuade an appellate court that they are filed for the sake of form only, and merely with the hope, rather than any expectation, of their being granted.

Yet counsel for the appellant feel that certain facts in the case have been so misapprehended that an injustice has been done their client. Further, they are persuaded that the court has established a new standard in the matter of arrest, search, and seizure of a person's home.

Naturally counsel realize and appreciate the delicacy of their position. A too forceful presentation might easily be construed as lacking in that degree of respect due a court of high dignity; yet, on the other hand, "too much nicety would destroy the true effect of the points under consideration." May we declare at the outset that no word shall pass which has for its purpose any reflection on the court; and if there be any so loose that it offend, let it be ascribed to inadequacy of language.

ARGUMENT

I.

From the court's recital of the "substantial evidence in support of the factual situation" it appears that certain facts have been misapprehended.

Most important of all are the court's statements, "There were sounds of someone *scurrying around for several minutes* after which the officer was admitted, and "Before admission, there ensues *some minutes of scurrying within.*"

Not a single witness testified at any time that there were sounds of someone scurrying within and no one testified that any noise or sound therein lasted several minutes.

According to Webster scurry means to hasten away or along. The New Standard dictionary defines scurry — to move swiftly and with rapid movement —as if with precipitate haste. Scurry carries the connotation of flight. The appellant contends, with all respect, that it is both inaccurate and unjust to place such a construction upon the testimony. Manifestly the court's decision hinges on what occurred when Officer Belland knocked—the smell alone not being sufficient. Strict adherence to the language used by the witnesses is absolutely necessary to a correct and fair decision. The appellant has the absolute right to be tried upon the record exactly as made below.

There were four officers, instead of three, at the door when Belland knocked. Belland testified he knocked and in response to an inquiry gave his identity. He was asked to wait a minute and after doing so rapped again—he heard "some shuffling or noise" in the room and shortly after (not several minutes) the appellant came to the door and opened it (R. 39). Officer Giordano testified he heard someone say, "Just a minute" and then there was "some rustling" (R.

93). Officers Goode and Graben were at the appellant's door at the very same time, and while both testified to the conversation between Belland and the appellant, neither of them said that there was any noise in the room (R. 80, 97).

And strange to say, Officer Graben placed Officer Giordano, who testified to the "rustling," on the fire escape at the time Belland rapped (R. 97). To the same effect is the testimony of Officer Goode (R. 80, 81). So did Belland his counter affidavit (R. 13).

On June 28, 1946, Officers Belland, Graben, and Goode made affidavits in opposition to the appellant's motion to suppress. That was nearly a month before trial and the only matter for consideration and decision was the legality of the arrest, search, and seizure. Every one of those agents described the entry to the hotel and narrated what occurred thereafter at the appellant's door. Not one of them even so much as mentioned hearing any noise of any kind in the appellant's room (R. 10, 11, 12, 13, 14, 15).

The evidence should have been ordered suppressed at that hearing. The Government agents' showing included only an informer's tip and a sense of smell. The authorities are practically unanimous in holding that an informer's tip is worthless in determining the existence of probable cause. Only the sense of smell could be properly considered. The sense of smell, without more, is not sufficient to justify an arrest and an invasion of a person's home.

Taylor v. U. S., 286 U.S. 1;

U. S. v. Lee, 83 F.(2d) 195.

The opinion states that at the time Lt. Belland received the informer's tip "the officer was engaged in the arrest of another person." The record not only fails to support that statement but is directly to the contrary. Belland called the informer by phone and arranged to meet him at Fourth and Cherry Streets at 7.30 (R. 59). Thereafter he drove the informer to the Europe Hotel, waited until he had gone into the hotel and come out, drove him back to Fourth and Cherry and then proceeded to Sixth and Jackson where he got in touch with the Federal Narcotics Agents (R. 58, 59, 65). The Federal Agents knew Belland was going to contact Odekirk, the informer; they were going on *their* case, his duty was to contact Odekirk (R. 65). When Belland arrived at Sixth and Jackson, the Federal Agents had already made *their* arrest (R. 86).

Respecting the "delay for the purpose of securing warrant for arrest and search in the circumstances would have been fatal to the detection of suspected crimes," be it said that there had already been a delay of over an hour (R. 59, 72). Moreover, the appellant's room was surrounded, officers at her door, an officer on the fire escape overlooking the only window, and officers stationed below at the exit. How could anyone in the room get away? It may have inconvenienced the officers to take a little more time in obtaining a search warrant, but as the Supreme Court of the United States in the *Taylor* case, 286 U.S. 1, said a short period of watching would have prevented possibility of material change during the time necessary to secure a search warrant.

See also:

U. S. v. Kaplan, 89 F.(2d) 869.

The appellant's constitutional rights should not be suspended and held for naught whenever some difficulty arises in their observance. The Government should arrest and prosecute by fair and lawful means or not at all. *U. S. v. Read*, 42 F.(2d) 636.

II. and III.

The appellant declares that she has considerable difficulty in following the court's opinion respecting the argument of the United States Attorney. First the suggestion is made that defense counsel may have baited the United States Attorney. Then it is said that the misconduct did not constitute reversible error. Then again, that no exception was taken, nor any objection made; and since counsel for the appellant was satisfied, the appellant must suffer the consequences because the evidence "just about" demonstrated her guilt.

Truly she is in a quandary. If it is shown there was no baiting, she is confronted with a holding that there was no prejudice; and if she is able to show some measure of prejudice, then she meets the stonewall of "no objection."

In arriving at its decision the Circuit Court of Appeals apparently overlooked Rule 52, Section (b) of the Rules of Criminal Procedure, 18 U.S.C.A., following 687, which states "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

A note on that rule in the second preliminary draft declares "the concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which objection and exception were not imposed at the trial." It may be observed also in passing that the new rules of criminal procedure abolished the need for exceptions.

The court's attention is called to the case of *U. S. v. Atkinson*, 297 U.S. 157, "in exceptional circumstances, especially in *criminal cases*, appellate courts in the public interest, may of their own motion, notice errors to which no exception was taken, if the errors are obvious, *or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.*"

McCandless v. U. S., 298 U.S. 345, lays down the principle that it is, "a well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial."

Is not the true test here, did the appellant receive a fair trial? Was she well and truly tried on the evidence or did the United States Attorney throw the weight of his office against her in a disconnected, flamboyant talk mainly accusatory of her representative asserting that in his belief (and what court justifies such expressions of belief, what right or standing have counsel's personal opinions in a trial?) that he had made up, concocted the "story of the defense?" Certainly he went much further than that—accused

him of concocting a story, of testifying himself, putting the words in her mouth, and inducing the appellant to execute a false affidavit incorporating his fabrication, and even declaring that she committed perjury "in other instances in this case."

What was the purpose of such an argument if not to persuade the jury that the appellant and her counsel had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief? *Weathers v. U.S.*, 117 F.(2d) 585. Far from having no effect upon the jury, "it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations (to refrain from improper methods calculated to produce a wrongful conviction) which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *U. S. v. Berger*, 295 U.S. 629.

It is respectfully submitted that the court below committed error and that the judgment of conviction should be reversed.

Respectfully submitted,

H. Sylvester Garvin,

Anthony Savage,

Counsel for Appellant.